United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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P/S

76-1009

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

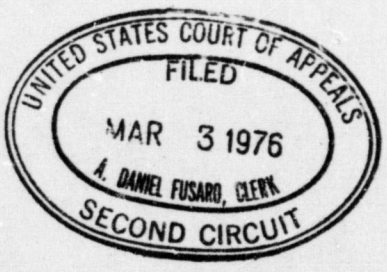
JOHANNES PRESCOTT,

Appellant.

Docket No. 76-1009

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the sentence imposed upon appellant was violative of due process because it was more severe than necessary to meet the articulated purpose of the punishment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment rendered December 10, 1975, upon a plea of guilty in the United States District Court for the Southern District of New York (The Honorable Lloyd F. MacMahon) to one count of aiding and abetting the sale of .57 grams of cocaine (21 U.S.C. §§812; 841(a)(1), (b)(1)(A)). Appellant Prescott was sentenced to a five-year period of imprisonment, to be followed by a three-year term of special parole.

The District Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was continued as counsel pursuant to the Criminal Justice Act.

Statement of Facts

On December 10, 1975, Judge MacMahon sentenced appellant to a five-year term of incarceration followed by a three-year term of special parole pursuant to a conviction based on a plea of guilty to one count of an indictment[1] which charged aiding and abetting the sale of .57 grams of

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[1] The indictment is B to appellant's separate appendix.

cocaine (21 U.S.C. §§812; 841(a)(1), (b)(1)(A); 18 U.S.C. §2)). This proceeding followed Judge MacMahon's vacature, on appellant's motion, of the original sentence, on the ground that it had been illegally imposed.

A. Prior History

On May 27, 1975, the day scheduled for trial, appellant Prescott changed his previously entered plea of not guilty to a plea of guilty[2] of aiding and abetting his co-defendant, Jerry Braxton, in the July 26, 1974, cocaine sale to undercover agents. Appellant's involvement in the transaction amounted to introducing the agents to Braxton (Transcript dated May 27, 1975, at 30). On July 14, 1975, in what the record reveals was approximately a thirty-second proceeding, appellant was sentenced to a five-year term of imprisonment, to be followed by a three-year term of special parole. The entire transcript of the sentencing follows:

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[2]At the time of his plea appellant was represented by a CJA panel attorney who had been assigned only a few days earlier. Appellant Prescott had originally been represented by Jack Lipson, an attorney associated with The Legal Aid Society, Federal Defender Services Unit. Mr. Lipson was relieved as counsel by Judge MacMahon when, at the first pretrial conference held on May 20, 1975, Mr. Lipson was unable to accommodate Judge MacMahon's unalterable demand that the case go to trial on May 27, 1975 (Transcript dated May 20, 1975, at 4-8). After sentence, CJA panel counsel was relieved and The Legal Aid Society, Federal Defender Services Unit, was assigned to represent Mr. Prescott on appeal.

THE CLERK: United States of America versus Johannes Prescott.

MR. TIMBERS: Ready for the Government.

MR. MITCHELL: Defendant is ready.

THE COURT: I will hear the Government.

MR. TIMBERS: The Government has nothing to add to the presentence report.

MR. MITCHELL: I have spoken to the probation officer, so I am fairly familiar with what is in the report, and I know of Mr. Prescott's background, which is reflected in the report. The only thing I say to Your Honor is although he did plead guilty I don't think he is as culpable as the co-defendant was, and from my reading of the grand jury minutes and certain other reports which Mr. Timbers submitted to me prior to the trial, I get the picture of a man who was just on the fringe of the thing, although he had been mixed up in narcotics before.

I ask Your Honor to be as lenient as possible.

THE COURT: Do you have anything to say for yourself, Mr. Prescott, before the Court pronounces sentence?

DEFENDANT PRESCOTT: No, Your Honor, I don't think so.

THE COURT: What count did ne plead guilty to?

MR. MITCHELL: He pled guilty to Count 2.

THE COURT: The Court sentences you to five years on Count 2 and to three years special parole.

MR. MITCHELL: Would Your Honor dismiss the open counts?

MR. TIMBERS: No objection.

THE COURT: Motion is granted and the defendant is remanded.

Transcript dated July 14, 1975, at 10-11. Emphasis added.

On appeal (Docket No. 75-1281), appellant challenged the judgment on the ground that counsel at the District Court proceedings had failed adequately to represent appellant at sentence. In the brief to this Court, newly assigned appellate counsel advised the Court that the U.S. Probation Department for the Eastern District of New York had rejected a request to examine the presentence report because, under the Department's reading of Rule 32(c), counsel could see the report only before sentencing. A formal motion to examine the report was therefore filed and was then sub judice before Judge MacMahan[3] (Appellant's Brief, Docket No. 75-1281, fn. at 10). It was subsequently learned that, in fact, there was no presentence report in existence (see Rule 35 Motion, Document #10 to the Record on Appeal), and the motion was withdrawn.

Upon discovery of the fact that appellant had been sentenced without benefit of a presentence report, appellant withdrew his appeal and, on October 20, 1975, filed a motion in the District Court to vacate the sentence as illegally imposed.[4] That motion was granted on November 12, 1975, and

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[3] The motion is docketed as part of the record on appeal.

[4] The motion is docketed as part of the record on appeal.

counsel was permitted to examine the then-completed presentence report.

B. The December 10, 1975, Sentencing

Appellant Prescott, who had been incarcerated at the Federal Medical Center in Springfield, Missouri, was returned to New York for re-sentence. Counsel, in her statement on behalf of Mr. Prescott, reminded Judge MacMahon that appellant was less culpable than his co-defendant, Jerry Braxton.[5] Appellant's involvement in the cocaine transaction[6] had been tangential, since all appellant had done was to introduce the undercover agents to Braxton (Transcript dated December 10, 1975, at 3). Appellant received no money in exchange for his participation in the deal, but instead was given a small sample of cocaine for his personal use (Id. at 3).

Critically, counsel asserted that appellant's participation in this 1974 crime had not been for financial gain, but rather was the result of the addiction to drugs which

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[5] Braxton, who the agents believed was involved in an ongoing drug operation, was sentenced to five years' imprisonment and a three-year term of special parole.

[6] Counsel's attempt to present the fact that cocaine is acknowledged by some authorities in the field to be less dangerous than heroin, barbituates, and amphetamines was rejected by Judge MacMahon as irrelevant (Id. at 4-5).

appellant suffered at that time[7] (Id. at 3-4). Counsel argued that appellant's performance during his several-month period of incarceration had been satisfactory and that therefore, should the Judge believe there was a surviving addiction problem which required further incarceration, only a brief period was necessary (Id. at 5).

In response, Judge MacMahon stated:

> ... I fully agree with Miss Ginsberg that it is perfectly plain to anyone that your involvement in this crime was to satisfy your own habit. But that makes it no less, no less at all a danger to the community. Quite the contrary; it is people who are addicted pushers, addict solicitors, in sales of narcotics who furnish the grist for this rotten business. It is a built in sales organization, and to me you are every bit as much of a danger to the community as someone who sells it for money. In fact, you may be more so because you probably can't help yourself whereas they might.
>
> (Id. at 7).

Judge MacMahon then sentenced appellant to the same five-year term of incarceration to be followed by a three-year term of special parole.

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[7] At the time of his plea appellant specifically told the Judge that he was then taking methadone to block the need for heroin and cocaine. Appellant further asserted that the last time he had taken either heroin or cocaine was in 1974 (Transcript dated May 27, 1975, at 25-26).

ARGUMENT

THE SENTENCE IMPOSED UPON APPELLANT WAS MORE SEVERE THAN NECESSARY TO MEET THE ARTICULATED PURPOSE OF THE PUNISHMENT, AND ACCORDINGLY WAS VIOLATIVE OF DUE PROCESS.

At the sentencing proceeding Judge MacMahon acknowledged that appellant's participation in the cocaine sale was the direct and sole result of his 1974 addiction and that appellant committed the crime because he "probably couldn't help himself." Nonetheless, rather than view appellant's addiction as a factor in mitigation of the penalty to be imposed, Judge MacMahon considered it justification for imposition of the severe five-year period of incarceration.

Judge MacMahon explained that he believed appellant was unresponsive to normal self-discipline and was a greater danger to society than persons motivated to sell drugs solely for financial profit. Apparently the sentence was motivated by a desire to protect society and presumably to rid appellant of any dependence on drugs so as to eliminate any danger he would present to society.

A fact overlooked or ignored by the Judge was that when appellant appeared for sentencing on December 10, 1975, he had not used either heroin or cocaine for a period of at least one year. This statement was uncontradicted. Moreover, appellant's incarceration after the first sentence, beginning

on July 14, 1975, prevented him, during the period from July to December, from resort to the methadone he admittedly had used to block his desire for heroin. Consequently, at the time of sentence, appellant had been off heroin for a year, and had been completely drug-free for five months. Further, during the period of incarceration appellant's performance at the institution was satisfactory, thereby indicating that he was already well on his way to rehabilitation.

It is now well settled that the procedures by which sentence is imposed are a proper subject for appellate review. United States v. Tucker, 404 U.S. 443, 447 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948); United States v. Brown, 470 F.2d 285 (2d Cir. 1972); McGee v. United States, 462 F.2d 243, 245 (2d Cir. 1972); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970).

On this record, imposition of the five-year term of incarceration was error mandating vacature for two reasons:

First, the sentence was apparently based on the incorrect belief that it would take appellant five years to overcome his addiction. In fact, it has been established that, after withdrawal from drugs, rehabilitation ideally takes a period of from four to six months. Winick, Narcotics Addiction and its Treatment, 22 Law & Contemp. Prob. 9, 22-24 (1957); see also Robinson v. California, 370 U.S. 660, 673 (Douglas, J., concurring).

This Court held, in United States v. Malcolm, supra, 432

F.2d at 816:

> Misinformation or misunderstanding that is materially untrue regarding a prior criminal record or material false assumptions as to any facts relevant to sentencing renders the entire sentencing procedure invalid as a violation of due process.

Since the District Court's erroneous belief as to the length of time necessary to overcome addiction influenced the severity of the sentence imposed, the sentence must be vacated.

Further, since appellant's achievement of a drug-free status will properly take months and not years, the sentence here must be vacated also because it was imposed in total disregard of the constitutional requirements that criminal punishment not exceed the least restrictive alternative necessary to accomplish the desired goal.

The least restrictive alternative standard is applicable to sentencing because it is the traditional due process test for governmental limitation on fundamental constitutional rights. In Shelton v. Tucker, 364 U.S. 479 (1970), the Court, in striking down an Arkansas law which required all teachers to file annual affidavits listing membership in every organization to which the teacher belonged, noted:

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.
>
> Id., 364 U.S. at 488.

Similarly, in Aptheker v. Secretary of State, 378 U.S. 500

(1964), the Court, in striking down a provision which limited the right of members of the Communist Party to travel, ruled that "Congress ha[d] within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security." Id., 378 U.S. at 512-513. The Shelton least restrictive alternative theory has been applied to innumerable fundamental liberties, including recently the right to peaceful picketing near schools (Police Department of Chicago v. Mosley, 408 U.S. 92, 101 (1972)), and the right to vote without unreasonable residence durational requirements (Dunn v. Blumstein, 405 U.S. 330, 343 (1972)). The principle has even been applied to prohibit excessive limitations on the rights of pretrial detainees (Brenneman v. Madigan, 343 F.Supp. 128, 138 (N.D.Cal. 1972)), and to protect the rights of patients civilly committed to mental hospitals (Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969)).

The view that proper punishment involves the least possible imprisonment is compelled by the need to protect liberty of the individual from the arbitrary and capricious limitations imposed by the current sentencing system. Recently Mr. Justice Brennan wrote, while concurring in Furman v. Georgia, 408 U.S. 238 (1972):[8]

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[8] Furman concerned a challenge to capital punishment based on the cruel and unusual punishment clause.

> The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less sever punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.
>
> Id., 408 U.S. at 279.

This principle, that a severe punishment "serves no penal purpose more effectively than a less severe punishment," 408 U.S. at 280, was recognized by the Court in Weems v. United States, 217 U.S. 349, 381 (1910),[9] and is implicit in Mr. Justice Douglas' concurrence in Robinson v. California, 370 U.S. 660 (1962), when he wrote that "a punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" Id., 370 U.S. at 676.[10]

The least restrictive alternative theory of punishment has been urged by the current and extensive studies of sentencing and sentencing problems, including the National Council on Crime and Delinquency, the American Law Institute Model Penal Code, and the American Bar Association, which suggests:

> The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of

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[9] Weems concerned a challenge to a lengthy prison sentence based upon an unfair law governing the Philippines. The challenge was based upon cruel and unusual punishment.

[10] In Robinson, the Court struck down addiction as a "status" crime.

> the offense, and the rehabilitative needs of the defendant.
>
> American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, §2.2 at 14 (Approved draft, 1968).

For these reasons the sentence below must be vacated and appellant remanded for re-sentence. Since the trial judge who imposed this sentence has already done so twice, the case should be remanded to a different judge. United States v. Saddler, Doc. No. 75-2130, slip opinion 2063, 2070 (2d Cir., February 20, 1976); United States v. Brown, supra, 470 F.2d at 288; United States v. Picard, 464 F.2d 215 (1st Cir. 1972); Manson v. United States, 463 F.2d 29 (1st Cir. 1972); see also United States v. Yagid, Doc. No. 75-1288, slip opinion 1437, 1441-1442 (2d Cir., January 5, 1976).

CONCLUSION

For the foregoing reasons, the sentence should be vacated and the case remanded to a District Judge other than Judge MacMahon for re-sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

March 3, 1916

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Louis Ginsberg